Supreme Court, U.S
FILED
00 164 JUL 28 2000
OFFICE OF THE CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

RICARDO LOPEZ-ELIAS, *Petitioner,*

versus

JANET RENO, ATTORNEY GENERAL, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BRUCE ANTON
Counsel of Record

BRIAN BATES *and*
TERRY-LYNN WINSTON
Attorneys for Petitioner

705 Ross Avenue
Dallas, Texas 75202
(214) 741-9027

46pp

QUESTION PRESENTED

Whether the interpretation of 8 U.S.C. § 1252(a)(2)(C)—judicial review of orders of removal, orders against criminal aliens—by the Fifth Circuit Court of Appeals, which denied jurisdiction over petitioner's case, is in error and violates the due process of law clause of the Fifth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioner is Ricardo Lopez-Elias.

Respondent is Janet Reno, Attorney General.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Cited Authorities v

Table of Appendices viii

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 3

A. Proceedings Below 3

B. The Effect of the Fifth Circuit Court's Decision 5

Reasons for Granting the Writ 6

I. The Fifth Circuit's Decision Conflicts With The Decisions Of The Seventh Circuit And The First Circuit Courts 6

II. The Fifth Circuit's Opinion Is Contrary To Basic Principles Of Statutory Construction 8

Contents

Page

III. The Fifth Circuit's Opinion Denies Petitioner Due Process of Law Under The Fifth Amendment 10

IV. Petitioner Has Not Committed An Aggravated Felony For Purposes of Deportation Nor For The Purpose of Denial Of Jurisdiction 11

A. Petitioner is not an aggravated felon for committing a "burglary" offense 11

B. Petitioner is not an aggravated felon for committing a theft offense 13

C. Petitioner should not be classified as an aggravated felon under 8 U.S.C. § 1101(a)(43)(F) because petitioner was not charged by the INS under this statute and burglary of a vehicle is now classified as a misdemeanor 14

Conclusion 16

TABLE OF CITED AUTHORITIES

Page

Cases:

Lopez-Elias v. Reno, 209 F.3d 788 (5th Cir. 2000)..... 1

Choeum v. Immigration and Naturalization Service, 129 F.3d 29 (1st Cir. 1997) 6, 7, 8, 9n3

Xiong v. I.N.S., 173 F.3d 601 (7th Cir. 1999) 6, 7, 8

Abdel-Razek, 114 F.3d 831 (9th Cir. 1997) 8

Frisby v. Schultz, 487 U.S. 474 (1987) 9

Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) ... 10

Reno v. Flores, 507 U.S. 292 (1993) 10, 16

Taylor v. U.S., 495 U.S. 575 (1990) 11, 12, 13

Hopkins v. State, 864 S.W.2d 119 (Tex.App.—Houston [14th Dist.] 1993, pet. ref'd.) 12n5

United States v. Turley, 352 U.S. 407 (1957) 12

Matter of Roberts, 10 I&N Dec. 194 (BIA 1991) 13

Matter of Contreras, 18 I&N Dec. 30 (BIA 1981) 13

Matter of M-, 3 I&N Dec. 804, 805 (BIA 1949) 13

INS v. Chadha, 462 U.S. 919 (1983) 16

Table of Cited Authorities

Page

Pension Benefit Guar. Corp v. R.A. Gray & Co.,
467 U.S. 717, 733 (1984)..... 15n8

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976) 15n8

United States Trust Co. v. New Jersey,
431 U.S. 1 (1977) 15n8

Welch v. Henry, 305 U.S. 134, 147 (1938).....15n8

Statutes:

28 U.S.C. § 1254(1) 1

8 U.S.C. § 1252(a)(2)(C) .....i, 1, 3, 5, 6, 7, 9, 10

8 U.S.C. § 1227(a)(2)(A)(iii) 2, 3

8 U.S.C. § 1101(a)(43)(F) .....iv, 2, 3, 4, 5, 7, 14

18 U.S.C. § 16 .....2, 3, 14

8 U.S.C. § 1101(a)(43)(G) 3, 4, 11, 12

8 U.S.C. § 1101(a)(43)(A) 7

8 C.F.R. § 242.16(d) 10

Texas Penal Code § 30.04 (Vernon's 1998) 11, 12n5, 14

Table of Cited Authorities

Page

Texas Penal Code Chapter 12 & Chapter 31 .....13n6

United States Constitution:

Fifth Amendment .....i, iv, 1, 6, 7, 9, 10, 14

Other Authorities:

21 C.J.S. *Courts* § 153 (1990) 6n1

82 C.J.S. *Statutes* § 315 (1999) 9n2

82 C.J.S. *Statutes* § 310 (1999) 9n4

142 Congressional Record S4598 (May 2, 1996) 15n7

TABLE OF APPENDICES

Page

Appendix A—Opinion Of The United States Court Of Appeals For The Fifth Circuit, Dated And Filed May 1, 2000 1

Appendix B—Decision Of The Board Of Immigration Appeals, Filed October 4, 1999 10

Appendix C—Decision And Order Of The Immigration Judge, Filed April 19, 1999 16

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Fifth Circuit Opinion (Appendix A) is reported at *Lopez-Elias v. Reno*, 209 F.3d 788 (5th Cir. 2000). The opinion of the Board of Immigration Appeals (Appendix B) is unpublished, *Lopez v. I.N.S.*, Docket Number 99-60134, date of decision 2/15/2000. The opinion of the Immigration Court is attached as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on May 1, 2000 (Appendix A).

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution.

The Fifth Amendment states in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Fifth Circuit Court of Appeals denied jurisdiction to petitioner under 8 U.S.C. § 1252 (a)(2)(C) which states:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final

> order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

8 U.S.C. § 1227(a)(2)(A)(iii) applies in petitioner's case and states in pertinent part, "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."

Aggravated felony is defined at 8 U.S.C. § 1101(a)(43)(F) as:

> A crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year.

A crime of violence is defined at 18 U.S.C. § 16 in the following manner:

> The term "crime of violence" means ---
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The term aggravated felony is defined at 8 U.S.C. § 1101(a)(43)(G) as:

> A theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year.

STATEMENT OF THE CASE

A. Proceedings Below

The United States Fifth Circuit Court of Appeals granted respondent's motion to dismiss Petition For Review For Lack of Jurisdiction in accordance with that court's interpretation of U.S.C. 8 § 1252(a)(2)(C).

Petitioner was charged on December 17, 1998 with

> Section 237(a)(2)(A)(iii) [8 U.S.C. § 1227(a)(2)(A)(iii)] of the Immigration and Nationality Act (ACT) . . . to wit: a crime of violence (as defined in section 16 of title 18, United States Code, not including a purely political offense), for which a term of imprisonment imposed was one year or more.

On March 5, 1999, counsel for petitioner filed a "Motion For A More Definite Statement," requesting the INS to clarify which definition, (a) or (b) of the term "crime of violence," under Section 16 of Title 18, applied in petitioner's case.

On March 25, 1999, the INS changed the original charge to 8 U.S.C. § 1227(a)(2)(A)(iii) as defined in 8 U.S.C. § 1101(a)(43)(G).

On April 19, 1999, the Trial Judge decided that petitioner was deportable for a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F) *for which petitioner was not charged* (Appendix C, page 18), and also stated that petitioner's offense could be viewed as a theft (for which petitioner was not convicted) as easily as a burglary under 8 U.S.C. § 1101(a)(43)(G) (*id.* at 18-19).

Petitioner appealed this decision to the Board of Immigration Appeals (BIA), and on October 4, 1999 the BIA dismissed the appeal, but stated that petitioner's deportability as an alien convicted of a crime of violence under section 101(a)(43)(F) (also referred to as section 8 U.S.C. § 1101(a)(43)(F)) was not properly before them because the INS amended the charge (Appendix B, page 13). However, the BIA determined that petitioner was deportable under 101(a)(43)(G) (also known as 8 U.S.C. § 1101(a)(43)(G)) which in pertinent part states that "the term aggravated felony means—a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." The BIA determined that petitioner did not commit a burglary, as burglary of a vehicle does not fall under the generic definition of burglary that applies if the statute does not define burglary (Appendix B, pages 13-14), but rather the petitioner was guilty of a "theft offense" and was therefore deportable on this basis (*id.* at 14-15).

The petitioner filed a Petition for Review with the Fifth Circuit Court of Appeals on November 3, 1999, arguing that he had not committed a "theft offense" and was therefore not guilty of an aggravated felony. The Fifth Circuit agreed with petitioner's argument that he had not committed theft. The court reasoned that he did not commit a "theft offense" because the charge that petitioner plead to stated only that he had committed burglary of a

vehicle with *intent* to commit theft. Petitioner's conviction did not require a finding that he had actually committed theft (Appendix A, pages 5-6).

The Fifth Circuit states that petitioner is not removable for committing a burglary or theft offense—for which he was removed (Appendix A, pages 5-6). In conclusion, however, the opinion states that their court does not have subject matter jurisdiction as set out under 8 U.S.C. § 1252(a)(2)(C) because petitioner *is removable* as an aggravated felon, which the Fifth Circuit Court decided he is according to their interpretation of 8 U.S.C. § 1101(a)(43)(F), a crime of violence, *he was not charged with at the trial level* (Appendix A, pages 7-8).

B. The Effect of the Fifth Circuit Court's Decision.

18 U.S.C. § 1252(a)(2)(C) states that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" an aggravated felony. The term "is removable" is latently ambiguous and the Fifth Circuit interpreted this to mean that they have no jurisdiction if petitioner *could have been removed* for any criminal offense listed under this statute, whether or not this was the offense petitioner was deported for (Appendix A, page 8). Their conclusion: "[w]hat the INS originally charged is of no consequence; so long as the alien in fact is removable for committing an aggravated felony, this court has no jurisdiction, irrespective of whether the INS originally sought removal for that reason" (*id).*

In dicta, the Fifth Circuit states that petitioner is not removable for committing a burglary or theft offense—for which he was removed (Appendix A, page 5). The opinion finally determines, however, that their court does not have jurisdiction because petitioner is guilty of an aggravated

felony, a crime of violence, *he was not charged with* (Appendix A, page 2, and 5).

The effect of this opinion is to make a decision of the Immigration Courts non-reviewable if the deportee *could have been* deported for any criminal offense listed under 8 U.S.C. § 1252(a)(2)(C). This means that an appellate court may make a factual determination of the criminal offense based upon records gathered under *another* charge by the trial court.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court's interpretation of 8 U.S.C. § 1252(a)(2)(C) conflicts with well reasoned decisions from two other circuit court, conflicts with basic principles of statutory interpretation, and violates fundamental principles of due process under the Fifth Amendment to the United States Constitution.

I.

THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF THE SEVENTH CIRCUIT AND THE FIRST CIRCUIT COURTS

Federal circuit courts are not bound by the decisions of other circuits, but in the interest of uniformity should not usually reach a result in conflict with another circuit court, unless that decision is clearly erroneous.[1] The decision by the Fifth Circuit in *Lopez-Elias v. Reno* (Appendix A) conflicts with the prior decisions of the Seventh Circuit Court of Appeals and the First Circuit Court of Appeals.

---

[1] *See generally* 21 C.J.S. *Courts* § 153, pages 189-190 (1990).

Xiong v. INS, 173 F.3d 601 (7th Cir. 1999), like petitioner's case involves the question of whether or not Xiong was an aggravated felon for purposes of deportation and for purposes of jurisdiction of the circuit court. The INS charged Xiong with a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F) for the criminal offense of statutory rape. *Id.* at 603. Xiong contended that this offense did not constitute a "crime of violence" and thus he was not deportable as an aggravated felon. *Id.* at 604. The INS argued that even if statutory rape was not a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F), the Circuit Court was without jurisdiction to determine the matter under 8 U.S.C. § 1252(a)(2)(C) because Xiong is an aggravated felon under 8 U.S.C. § 1101(a)(43)(A)—a statute Xiong had not been charged with for purposes of deportation. In *Xiong*, as in petitioner's case, both jurisdiction and the merits turn on whether Xiong has committed an aggravated felony. The Seventh Circuit determined that statutory rape was not a crime of violence as defined under 8 U.S.C. § 1101(a)(43)(F). *Id.* at 607. Furthermore, the Seventh Circuit determined that it did have jurisdiction because, the INS cannot substitute alternative grounds for deportation at the judicial review stage in the proceedings; to do so would violate the alien's due process rights under the Fifth Amendment. *Id.* at 608 (referring to *Choeum v. I.N.S.,* 129 F.3d 29 at 33).

In the First Circuit Court opinion in *Choeum v. Immigration and Naturalization Service*, 129 F.3d 29 (1st Cir. 1997) the court needed to decide whether or not it had jurisdiction over the case because the INS classified the petitioner as an "aggravated felon." The "aggravated felony" classification was assigned by the INS because they claimed Choeum had committed a firearms offense. This court determined it had jurisdiction because Choeum was charged with deportability based on a kidnapping offense,

not a firearms offense. *Id.* at 32-33. The court held that the "INS may not substitute alternative grounds for deportation at this stage in the proceedings, and that its argument fails both as a matter of statutory construction and because it raises due process concerns under the Constitution." *Id.* at 33.

The Ninth Circuit opinion, *Abdel-Razek*, 114 F.3d 831 (9th Cir. 1997), that the Fifth Circuit relies on for its persuasive authority can be easily distinguished from both *Xiong* and *Choeum*. In *Abdel-Razek*, the petitioner did not question whether he was an aggravated felon for being convicted of manslaughter for stabbing a man to death, nor did he contest his criminal conviction for manslaughter, his Petition for Review involved the prior court's decision denying the applicability of a waiver. His deportation proceedings were based on his manslaughter conviction. The INS did not try to introduce a new charge through denial of jurisdiction based on a different crime at the appellate stage. In addition, the Ninth Circuit did not discuss due process issues in conjunction with the denial of subject matter jurisdiction. The use of this case for persuasive authority is therefore highly tenuous.

II.

THE FIFTH CIRCUIT'S OPINION IS CONTRARY TO BASIC PRINCIPLES OF STATUTORY CONSTRUCTION

Statutory interpretation involves a reasoned search for the intention of the legislature. The intention of the legislature is to be determined primarily from the language used in the statute, considering the entire language of the statute in its plain, ordinary, and popular sense. The court

may also consider the particular language employed in the context of the whole statutory scheme.[2]

The Fifth Circuit purports that the word "removable" means "could be removed" (Appendix A, page 8a). However, 8 U.S.C. § 1252(a)(2)(C) comes from a statutory section concerned with final orders of deportation. By its terms this section only applies to aliens who have actually been adjudged deportable. Therefore it is highly unlikely, in this context, that Congress meant "removable" to be defined as "potentially susceptible of being removable."[3]

Furthermore, there are certain presumptions of statutory interpretation which are that Congress intended for a statute to accomplish a just and rational result and that Congress acted with full knowledge of the constitutional scope of its powers.[4] In addition, within the rules of statutory construction there is a well established principle that statutes are to be interpreted to avoid constitutional difficulties. *Frisby v. Schultz*, 487 U.S. 474, 483 (1987). The Fifth Circuit's interpretation of 8 U.S.C. § 1252(a)(2)(C) cuts off judicial review based on an uncharged ground and thus allows the petitioner to be deported for an uncharged offense. This interpretation conflicts with petitioner's procedural due process rights as conferred under the Fifth Amendment to the United States Constitution, such as notice of the nature of the charges and a meaningful opportunity to be heard. The Fifth Circuit is relying on facts in the record developed under another charge without giving petitioner an opportunity to be fully heard on this issue.

---

[2] *See* 82 C.J.S. *Statutes* § 315, pages 406-407 (1999).

[3] *For similar argument see Choeum v. I.N.S.* at 38-39.

[4] *See* 82 C.J.S. *Statutes* § 310, pages 394-395 (1999).

III.

THE FIFTH CIRCUIT'S OPINION DENIES PETITIONER DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT

The Fifth Circuit's interpretation of 8 U.S.C. § 1252(a)(2)(C) cuts off judicial review based on an uncharged ground and thus allows the petitioner to be deported for an uncharged offense. To allow this interpretation in effect permits the INS to substitute alternative grounds for deportation after the trial adjudication, thus disallowing a fully informed response from petitioner. The INS had its opportunity to change the charge at the hearing stage. INS regulations permit the INS to lodge additional charges of deportability "at any time during a hearing" before an Immigration Judge, but these charges must first be submitted in writing for service on the alien and for entry into the record, that the Immigration Judge shall read the additional charges to the alien and explain them to her, and that the alien may have a reasonable time, including requesting a continuance, to respond to the additional charges. 8 C.F.R. § 242.16(d).

The power of Congress to regulate aliens is not completely unlimited. Resident aliens, such as petitioner, are "persons" for purposes of the Fifth Amendment's due process of law clause. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953). In addition, "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Reno v. Flores*, 507 U.S. 292, 306 (1993).

IV.

PETITIONER HAS NOT COMMITTED AN AGGRAVATED FELONY FOR PURPOSES OF DEPORTATION NOR FOR THE PURPOSE OF DENIAL OF JURISDICTION

Petitioner has not committed a burglary or a theft offense as defined under the definition of aggravated felony under 8 U.S.C. § 1101(a)(43)(G), "[a] theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year."

A. Petitioner is not an aggravated felon for committing a "burglary" offense.

Petitioner does not contest that on July 11, 1985 he was convicted in the 291st Judicial District Court of Dallas County, Texas for the offense of burglary of a vehicle, in violation of Texas Penal Code § 30.04. However, petitioner contends that burglary of a vehicle is not considered a "burglary" for deportation purposes.

Under the United States Supreme Court Case, *Taylor v. U.S.*, 495 U.S. 575 (1990), the Court held that where the definition of burglary is not given within the federal statute, a generic definition is to apply which would include the basic elements of "unlawful or unprivileged entry into, or remaining in a building or structure with intent to commit a crime." *Id.* at 598-99. The Court created this generic definition (based on the Model Penal Code) because absent plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law, "because the application of federal legislation is nationwide and at times the federal program would be

impaired if state law were to control." *Id.* at 591. *United States v. Turley*, 352 U.S. 407 (1957), quoted by *Taylor*, instructs that "in the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." *Id.* at 411. In the *Taylor* case the Court noted that because states may name a crime involving the elements of burglary something other than burglary, and a crime not involving the elements of burglary as burglary, using the state classification would be confusing and also an unjust application of the Enhancement Provision 18 U.S.C. § 924(e) of the Federal Sentencing Guidelines. *Id.* at 599-600. Therefore, a generic definition of "burglary" was called for. *Id.* at 602. Throughout this opinion the Court refused to hold that "burglary of a vehicle" fit the generic definition of burglary. The Court uses "burglary of a vehicle" to show how over-broadly some states define burglary and to show how unfair it would be to use burglary as an enhancement factor when some states, such as Michigan, formally name no offense burglary, and that some states, such as California, "define burglary so broadly as to include shoplifting and theft of goods from a "locked but unoccupied automobile." *Id.* at 591. Note, for example, that the Texas Statute for Burglary of a Vehicle does not require the car to be locked, and that Burglary of a Vehicle would occur if the defendant merely reached into the back of a pickup and removed property, not his, without the consent of the owner.[5]

Under 8 U.S.C. § 1101(a)(43)(G) no definition for burglary is given, therefore a federally generic definition of burglary should apply and this definition, as developed in *Taylor*, does not include burglary of a vehicle. Accordingly,

---

[5] *See* Tex.Pen.Code § 30.04 (Vernon's 1998) *and Hopkins v. State*, 864 S.W.2d 119 (Tex.App.—Houston [14th Dist.] 1993, pet. ref'd.) (taking ladder out of open bed of truck constitutes "entry").

under the generic definition of burglary, petitioner is not an aggravated felon.

B. Petitioner is not an aggravated felon for committing a theft offense.

Petitioner plead guilty in 1985 to Burglary of a Vehicle, he did not plead guilty to theft. Petitioner may not be deported for a crime not charged with nor convicted for as the elements of Burglary of a Vehicle do not support a conviction for theft. A conviction for theft requires proof of the type of property taken and the value of the property. The value of the property is important because it determines the sentence of the offender. If, for example, the value is under $500. it is a class B misdemeanor and the maximum sentence is six months,[6] which would disqualify the offense as an aggravated felony due to the sentence being under one year. "[T]he immigration judge must look to judicial records to determine whether an alien has been convicted of a crime, and he may not determine on his own the alien's guilt or innocence." *Matter of Roberts*, 10 I&N Dec. 194 (BIA 1991) citing *Matter of Contreras*, 18 I&N Dec. 30 (BIA 1981). Further, "[w]hile inquiry may be had into the circumstances surrounding the commission of the crime in order to determine whether a favorable exercise of discretion is warranted, it is impermissible to go behind a record of conviction to reassess an alien's ultimate guilt or innocence." *Matter of Roberts*, supra citing *Matter of M-*, 3 I&N Dec. 804, 805 (BIA 1949). The Court in *Taylor v. U.S.*, 495 U.S. at 602 instructs that in finding whether or not the defendant was convicted of the generic definition of burglary (for example), a categorical approach should be used. The rule is that the government can look only to the

---

[6] *See generally* Texas Penal Code Chapter 31, Theft, and Chapter 12, Punishments.

fact of conviction and the statutory definition of the prior offense.

C. Petitioner should not be classified as an aggravated felon Under 8 U.S.C. § 1101(a)(43)(F) because petitioner was not charged by the INS under this statute and burglary of a vehicle is now classified under the Texas Penal Code as a misdemeanor.

To classify petitioner as an aggravated felon under 8 U.S.C. § 1101(a)(43)(F) violates the procedural due process guaranteed under the Fifth Amendment (as discussed in section III of this petition) because he was not ultimately charged with this deportation offense.

To classify petitioner as an aggravated felon under this portion of § 1101 also violates petitioner's substantive due process rights under the Fifth Amendment. Under Texas law burglary of a vehicle is now (as of 1993) a Class A misdemeanor. Tx.Penal § 30.04 (Vernon's 1998). 8 U.S.C. § 1101(a)(43)(F) requires that to be a "crime of violence," as defined in 18 U.S.C. § 16, the offense must have a sentence of "*at least* one year." Under 18 U.S.C. § 16(b) crime of violence is defined as "any other offense that *is* a felony." Petitioner suggests "is" is to be given its plain meaning of the present tense. Burglary of a vehicle has been classified under Texas law as a Class A misdemeanor since 1993, *id.*, this class of offense requires a sentence of one year *or less,* this meaning is not the same as the statute requires: *"at least one year"*, (which in its plain sense means an offense sentence of one year or more*)*.

There are several compelling reasons to interpret the statute as petitioner suggests. Foremost is legislative intent as to the meaning of "one year or more" and "is" rather than

"was" a felony. Under the daily edition of the Congressional Record, the major drafter of the bill, Senator Abraham, states in reference to the problem of criminal aliens who are deportable and should be deported, "These are not suspected criminals: These are convicted felons."[7] He doesn't say "these are convicted misdemeanants!" The implication is he did not intend deportation for misdemeanors or crimes classified under the category of a sentence of 1 year or less.

In addition, if the meaning is interpreted to be "was a felony" instead of "is a felony" the result would be that some aliens would be deported for burglary of a vehicle as a felony while others would not be deported for the exact same offense committed at a later date. If their offense occurred after 1993 it would be classified as a Class A Misdemeanor with a sentence of 1 year or less. If the offense occurred before 1993 it would be classified as a felony with a sentence of one year or more. This application applies a present regulation unfairly based on the date of the past offense *not on the culpability of the alien.* This would not be a rational application of a statute, but would deprive aliens of their liberty in an arbitrary and capricious manner without sufficient justification for such a result.[8] In addition, when a statute is ambiguous in its meaning the principles of statutory constructions require

---

[7] *See* 142 Cong. Rec. S4598 (May 2, 1996).

[8] *See Pension Benefit Guar. Corp v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984) ("[A]lthough we have noted that retrospective civil legislation may offend due process if it is 'particularly "harsh and oppressive,'" that standard does not differ from the prohibition against arbitrary and irrational legislation that we clearly enunciated in Turner Elkhorn.") (*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)) (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 17 n.13 (1977) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938).

that it be applied in its most beneficial or least harmful manner to those who fall within its application.

While Congress has plenary power to enact immigration legislation, that power does not override the Court's mandate to see that Congress uses "constitutionally permissible means." *INS v. Chadha*, 462 U.S. 919, 940-41 (1983). In addition, *Reno v. Flores*, 507 U.S. 292, 306 (1993) mandates that INS regulation must *rationally* advance some legitimate governmental purpose.

The severity of the consequences of deportation to petitioner's liberty interest, especially because the criminal conviction occurred long ago, and the petitioner has an interest in repose, requires a close review of the arbitrary nature of the classification of aggravated felon by the INS, especially since the offense is currently classified as a misdemeanor by state law. The application of this statute should pass a basic rationality analysis which requires corresponding governmental interests be advanced to justify the retroactive attack on the petitioner's liberty interest.

Finally, if this provision applies to petitioner retroactively, then in fairness, the 1993 statute, amending burglary of a vehicle to a misdemeanor should also apply retroactively; it should be error to do otherwise. In its opinion denying jurisdiction because the petitioner is an aggravated felon for a crime of violence, the Fifth Circuit has in effect cut through the fabric of time, applying a 1996 immigration law to a 1985 offense while keeping the burglary of a vehicle offense as a felony when it is actually now as misdemeanor. Petitioner questions the fairness of applying a law that harms him retroactively while disallowing a criminal law to help him retroactively, especially when doing so would ensure more equal treatment to all those convicted of burglary of a vehicle.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRUCE ANTON
Counsel of Record

BRIAN BATES *and*
TERRY-LYNN WINSTON
Attorneys for Petitioner

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No 99-60757

Filed May 1, 2000

Ricardo Lopez-Elias, Petitioner

versus

Janet Reno, Attorney General, Respondent.

Petition for Review of an Order of
the Board of Immigration Appeals

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

This case requires the court once again to construe the criminal alien removal provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"). Specifically, we must determine whether a Texas conviction of burglary of a vehicle with the intent to commit theft constitutes a theft offense, a burglary offense, or a crime of violence—any of which alone would be sufficient to deny this court jurisdiction to review a final order of removal by the Immigration and Naturalization Service ("INS") and to authorize removal.

Because burglary of a vehicle with intent to commit

theft is a crime of violence (though neither a burglary nor a theft), the IIRIRA deprives us of jurisdiction over this petition. We therefore grant the motion to dismiss.

I.

In 1985, Ricardo Lopez-Elias was convicted in Texas state court of burglary of a vehicle with the intent to commit theft, in violation of TEX. PENAL CODE ANN. § 30.04(A) (West 1987), and sentenced to four years' imprisonment, suspended. In 1998, the INS served him with a notice to appear, charging him with being subject to removal as an aggravated felon, and in April 1999 an immigration judge ordered his removal. The Board of Immigration Appeals ("BIA") dismissed Lopez-Elias's appeal in October 1999, concluding that he had committed a theft offense, an aggravated felony under IIRIRA. See 8 U.S.C. § 1101(a)(43)(G).

Lopez-Elias filed a petition for direct review in this court on November 3, 1999, pursuant to 8 U.S.C. § 1252, arguing that he had not committed an aggravated felony, and alternatively claiming that the IIRIRA was an unconstitutionally retroactive law in violation of his right to due process. The INS now moves for dismissal of the petition on the ground that under the permanent provisions of IIRIRA, *see* 8 U.S.C. § 1252(a)(2)(C),[1] we lack jurisdiction over removal orders issued against criminal aliens.

II.

---

[1] Because the proceedings against Lopez-Elias were commenced after April 1, 1997, the permanent provisions of IIRIRA are in force. *See Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 302-03 (5th Cir. 1999); IIRIRA § 309(c)(1), (4), 110 Stat. 3009-625, -626.

Appendix A

We begin by examining the relevant provisions of federal immigration law as amended by IIRIRA. "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). The term "aggravated felony" includes "(F) a *crime of violence* (as defined in section 16 of Title 18,[2] but not including a purely political offense) for which the term of imprisonment [is] at least one year" and "(G) *a theft offense* (including receipt of stolen property) *or burglary offense* for which the term of imprisonment [is] at least one year." § 1101(a)(43)(emphasis added). IIRIRA further provides that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" an aggravated felony. § 1252(a)(2)(C).

We have jurisdiction to review jurisdictional facts.[3] That Lopez-Elias's four-year sentence was suspended is of no significance, for IIRIRA makes plain that "[a]ny reference to a term of imprisonment or a sentence with

---

[2] "The term 'crime of violence' means---

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

18 U.S.C. § 16.

[3] *See Camacho-Marroquin v. INS*, 188 F.3d 649, 651 (5th Cir. 1999) ("The prerequisites for review preclusion under INA § 242(a)(2)(C) are: (i) an alien; (ii) deportable; (iii) for committing a crime covered in INA § 237(a)(2)(A)(iii). This Court has jurisdiction to determine whether these prerequisites for precluding review have been met.").

respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." § 1101(a)(48)(B). Nor does Lopez-Elias dispute that he is in fact an alien. The only jurisdictional question, therefore, is whether he was convicted of an aggravated felony---that is, whether burglary of a vehicle with intent to commit theft constitutes a crime of violence, a theft offense, a burglary offense, or none of the above.

The INS claims that its conclusion that Lopez-Elias committed an "aggravated felony" is worthy of the familiar principles of deference to administrative agencies announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).[10] Even assuming the ambiguity of the statutory terms of IIRIRA, however, the fact that courts defer to the INS's construction of its statutory powers of deportation does not mean that similar deference is warranted with respect to the enforcement of this court's jurisdictional limitations. The former may trigger deference, by the determination of our jurisdiction is exclusively for the court to decide. This distinction is particularly important here, where the petitioner challenges not only the INS's statutory construction of its agency powers, but also the constitutionality of those powers.

Reviewing the matter *de novo*, we nevertheless conclude that we have no jurisdiction under IIRIRA, because Lopez-Elias was convicted of a crime of violence under §

---

[10] *See also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 120 S. CT. 1291 (2000); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25 (1999).

1101(a)(43)(F). First, however, we articulate why he was *not* convicted of a theft or burglary offense under § 1101(a)(43)(G).

A.

To determine whether an alien has committed an aggravated felony, courts look to the text of the statute violated, not the underlying factual circumstances.[11] According to the statute under which Lopez-Elias was convicted, "[a] person commits an offense if, without the effective consent of the owner, he breaks into or enters a vehicle or any part of a vehicle with intent to commit any felony or theft." TEX. PENAL CODE ANN. § 30.04(a) (West 1987).[12]

Lopez-Elias was specifically charged with burglary of a vehicle with intent to commit theft. Notably, however, his conviction did *not* require a finding that he had actually committed theft; mere intent to commit was sufficient.

---

[11] *See Camacho-Marroquin*, 188 F.3d at 652; *cf. Taylor v. United States*, 495 U.S. 575, 600 (1990); *United States v. Lomas*, 30 F.3d 1191, 1193 (9th Cir. 1994).

[12] At the time of Lopez-Elias's conviction, Texas law classified the offense as a third-degree felony. *See* TEX. PENAL CODE ANN. § 30.04(c) (West 1987). In 1993, the statute was amended to treat the offense as a Class A misdemeanor. *See* TEX. PENAL CODE ANN. § 30.04(d) (West 1999). How Texas characterizes the offense does not control federal immigration law, however, for federal law looks only to the term of imprisonment, and not state law, to ascertain whether the offense is a "felony." *See* § 1101(a)(43)(G); *cf. Moosa v. INS*, 171 F.3d 994, 1006 (5th Cir. 1999) (stating that "[t]he immigaration laws contain no . . . indication that they are to be interpreted in accordance with state law") (*quoting United States v. Campbell*, 167 F.3d 94, 98 (2nd Cir. 1999)).

Lopez-Elias therefore did not commit a "theft offense" for purposes of the IIRIRA.[13]

Nor did he commit a burglary offense. When Congress deploys the term "burglary" without specifying a definition, a generic understanding of the word based on the modern usage of the states, rather than the common law definition, should be used. As the Supreme Court has explained,

> [w]e believe that Congress meant by "burglary" the generic sense in which the term is now used in the criminal codes of most States. . . . Although the exact formulations vary, the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.

Taylor v. United States, 495 U.S. 575, 598 (1990).

Thus, an alien need not have broken into a dwelling, or done so at night, or done so with intent to commit a felony (as opposed to a lesser offense), to satisfy the generic definition of "burglary." *Id.* at 593. Nor must the act have presented a risk of physical injury to another person. *Id.* at 596-98.

---

[13] In addition to listing certain offenses such as theft as "aggravated felonies" triggering deportation, IIRIRA provides that merely "an attempt or conspiracy to commit" an enumerated offense is deemed a deportable offense. § 1101(a)(43)(U). The INS does not raise the argument, but we believe Elias could have been removed – and our jurisdiction could have been precluded – bases alternatively on the theory that burglary of a vehicle with *intent to commit theft* is tantamount to an offense of *attempted theft.*

The Court did distinguish, however, between burglary of "a building or other structure" on the one hand, *id.* at 598-99, and burglary of a vehicle on the other, *id.* at 599, ultimately concluding that the generic term of "burglary" embraced only the former, and not the latter.[14] Because Lopez-Elias was convicted of burglary of a vehicle, not a building, he did not commit a "burglary" for purposes of IIRIRA, and the INS therefore was not authorized to remove him by reason of his commission of a burglary offense.

B.

This court has previously recognized, however, that burglary of a vehicle does constitute a "crime of violence," justifying deportation under § 1101(a)(43)(F).[15] It is true that the INS did not actually pursue removal proceedings on this ground.[16] That the INS proceeded on grounds of theft or burglary, rather than crime of violence, however, does

---

[14] *See Taylor,* 495 U.S. at 602 ("For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction.").

[15] *See United States v. Delgado-Enriquez,* 188 F.3d 592, 595 (5th Cir. 1999) (noting that burglary of a vehicle is a crime of violence under 18 U.S.C. § 16(b)); *United States v. Ramos-Garcia,* 95 F.3d 369, 371 (5th Cir. 1996 (same); *United States v. Rodriguez-Guzman,* 56 F.3d 18, 20 (5th Cir. 1995) (same).

[16] Lopez-Elias's original notice to appear charged him with the prior commission of a crime of violence, but the INS subsequently amended its charge to theft or burglary. For this reason, the BIA expressly rejected the use of the crime-of-violence provision to justify removal.

not alter the conclusion that this court has no jurisdiction because of Lopez-Elias's conviction of a crime violence.

IIRIRA states simply that "no court shall have jurisdiction to review any final order of removal against an alien who *is removable* by reason of having committed" an aggravated felony. 18 U.S.C. § 1252(a)(2)(C) (emphasis added). What the INS originally charged is of no consequence; so long as the alien in fact is removable for committing an aggravated felony, this court has no jurisdiction, irrespective of whether the INS originally sought removal for that reason.[17]

III.

Federal Courts deprive their power to adjudicate from Congress, and not from the Constitution alone. The

---

[17] *See Abdel-Razek v. INS*, 114 F.3d 831, 832 (9th Cir. 1997) ("The fact that the BIA did not issue its order with reference to that section does not alter petitioner's status as a convicted felon for purposes of the availability of judicial review. We therefore lack jurisdiction."). We note, however, that other circuits have held differently. *See Choeum v. INS*, 129 F.3d 29, 38 (1st Cir. 1997) ("The INS's argument is essentially a linguistic one. According to the INS, for purposes of jurisdiction, aliens 'deportable by reason of' having committed firearms offenses are not only those aliens who have been ordered deported for firearms offenses, but also those aliens who could be deported for that reason. As a matter of statutory construction, that argument is somewhat illogical: The contested phrase comes from Section 440 (a) of AEDPA, a statutory section solely concerned with final orders of deportation. The section therefore applies, by its very terms, only to aliens who have actually been adjudged deportable. It is therefore highly doubtful that, in that context, Congress meant 'deportable by reason of' to mean, as the INS would have it, 'potentially susceptible to being deported by reason of....'"); *Xiong v. INS*, 173 F.3d 601, 608 (7th Cir. 1999) (same).

permanent provisions of IIRIRA therefore require that this petition for review be dismissed for want of jurisdiction.[18]

Accordingly, the motion to dismiss the petition for review is GRANTED.[19]

---

[18] Even if we are required to address Lopez-Elias's constitutional claim on the merits notwithstanding IIRIRA's express preclusion of jurisdiction, *see Max-George*, 205 F.3d 194, 199-200 (5th Cir. 2000) (stating that "courts faced with petitions for review from criminal aliens must determine whether the particular provisions classifying the petitioner under the jurisdiction-stripping provision . . . are being constitutionally applied"), the claim that IIRIRA is unconstitutionally retroactive has been rejected by this court on numerous occasions. *See id.* at 200 ("Congress has the power to make an alien's past criminal conduct subject to present or future deportation notwithstanding the fact that the alien could not have been deported for the act at the time it was committed."); *Moosa*, 171 F.3d at 1009 (opining that "it is well settled that Congress has the authority to make past criminal activity a new ground for deportation.") (*quoting Ignacio v. INS*, 955 F.2d 295, 298 (5th Cir. 1992)); see also *Lehmann v. United States ex rel. Carson*, 353 U.S. 685, 690 (1957).

[19] The INS's motion for leave to file in excess pages the motion to dismiss the petition for review and to extend the time for riling the administrative record is GRANTED. The INS's motion to extend the time for filing the administrative record is DENIED as unnecessary.

Appendix B

DECISION OF THE BOARD OF IMMIGRATION APPEALS

File: A13 657 249 - Dallas

Date Filed: October 4, 1999

In re: RICARDO LOPEZ-ELIAS

IN REMOVAL PROCEEDINGS APPEAL

On Behalf of Respondent: Terry-Lynn Winston, Esquire
919 Roble Lane
Santa Barbara, California
93103

On Behalf of Service: James R. Vincent
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination of proceedings

The respondent appeals from a decision of an Immigration Judge finding him removable as an alien convicted of an aggravated felony[1] and ordering the

[1] Recent changes in the definition of an aggravated felony apply to all convictions "regardless of whether they were entered before, on , or after the date of enactment." Section 321(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 (IIRIRA). Further, this definition applies to "all actions taken on or after the enactment of (IIRIRA),

respondent removed from the United States to Mexico. The respondent's request for oral argument is denied. 8 C.F.R. § 3.1(e). We will dismiss the appeal.

Before the Immigration Judge and on appeal, the respondent argues that at the time of his conviction his crime was not an aggravated felony. In his appeal brief, first the respondent argues that his 1985 conviction for burglary of a vehicle with the intent to commit theft is not a "burglary" offense because a vehicle does not entail unlawfully entering a building or structure, a required element of the crime of burglary. *See Taylor v. United States,* 495 U.S. 575 (1990) (looking to generic federal definition under 18 U.S.C. § 924(e) for burglary offense); *see also* section 101(a)(43)(G) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(G). The respondent urges that the Immigration Judge erred when he based his decision on his determination that the respondent's conviction for the offense of burglary of a vehicle was a crime of violence instead of whether burglary of a vehicle was a burglary for deportation purposes. Alternatively, he argues that his burglary of a vehicle conviction is not a crime of violence within the meaning of 18 U.S.C. § 16(b), and thus not an aggravated felony under section 101(a)(43)(F) of the Act. He also expressed his disagreement with the Immigration Judge's conclusion that, "The respondent's offense could be viewed as a theft matter as easily as a burglary and either may be considered to involve violent conduct." *See I.J.* at 2. Finally, the respondent argues that the retroactive application of the definition of aggravated felony under section 101(a)(43) of

---

regardless of when the conviction occurred." Section 321(c) of IIRIRA.

the Act violates the due process clause of the 5th Amendment of the United States Constitution.

The procedural history of this case is relevant to our consideration of the issues raised on appeal. The Immigration Judge provided an accurate description of the relevant procedural history on the first paragraph of his April 19, 1999, decision. The paragraph stated the following:

> [The respondent] was born in Mexico on September 2, 1949, and was admitted to the United States on February 3, 1964, as an immigrant. On July 11, 1985[,] he was convicted in Dallas County, Texas for a May 26, 1985[,] burglary of a motor vehicle for which he was sentenced to four years in prison which was suspended. On October 20, 1989, an order was entered by the sentencing judge setting aside the judgment of conviction and indictment. Then in late 1998 the respondent was arrested for outstanding traffic tickets apparently and briefly detained. When he was released, the Immigration and Naturalization Service took him into custody and issued a Notice to Appear on December 17, 1998, asserting that he is n aggravated felon and should be deported for the 1985 burglary of a vehicle. As originally filed, the NTA specified that the respondent was viewed as an aggravated felon as defined in the INA 101(a)(43) without reference to any particular subparagraph, but with a reference to a crime of violence. [The] [r]espondent's counsel requested that the reference to aggravated

> felony be clarified, and the INS responded by amending the NTA to explicitly mention INA Section 101(a)(43)(G). Subsection G of the definition contains a specific reference to theft or burglary, whereas subsection F refers to crimes of violence.

I.J. at 1-2.

We first address the question of whether the Immigration Judge erred by finding that the respondent was removable as an aggravated felon for being convicted of a crime of violence pursuant to subparagraph F of section 101(a)(43) of the Act. As noted above, the record shows that instead of answering the respondent's request for clarification of the original charge by stating either that the original charge was clear or that the Service intended to designate subparagraph F, the Service amended its charge by specifying that the respondent was removable under a subparagraph G of section 101(a)(43) of the Act. *See* Exh. 2, Correction of Original Charge. Consequently, the Immigration Judge's discussion relating to the respondent's deportability as an alien convicted of a crime of violence under section 101(a)(43)(F) of the Act is not properly before us because the Service amended the original charge of deportability (Exh. 2).

Section 101(a)(43)(G) of the Act provides, in pertinent part, that "the term aggravated felony means – a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." *Id.* The respondent argues that the United States Supreme Court, in *Taylor v. United, supra,* held that where no definition of burglary is given within the federal statute, a generic definition is to apply which would include the basic

elements of "unlawful or unprivileged entry into, or remaining in a building or structure with intent to commit a crime." *Id.* at 598. The United States Court of Appeals for the Fifth Circuit, noted that, "In making this declaration, the Court in *Taylor* clarified that its definition of burglary for purposes of § 924(e) [title 18 of the United States Code] was generic and premised on the most basic elements of the crime." *United States v. Silva,* 957 F.2d 157, 161 (5th Cir. 1992).

An alien, however, is removable pursuant to section 101(a)(43)(G) of that Act if he commits a theft offense or a burglary offense and is sentenced to a term of imprisonment of at least one year. The conviction for burglary of a vehicle under the Texas statute at issue here requires a showing that the defendant, without the consent of the owner, entered a vehicle with intent to commit any felony or theft. The Service submitted criminal records that show that the respondent was charged and convicted of breaking and entering a motor vehicle of another with the intent to commit a theft. The record contains the True Bill of Indictment that provides that the respondent testified that the respondent, "did unlawfully, knowingly and intentionally break and enter a vehicle, without the effective consent of . . ., the owner thereof, . . . , with the intent to commit theft" (Exh. 3). The respondent testified that he "stole a battery and a radio" (Tr. at 7). The record shows that the respondent's ultimate conviction contained the element of intent to commit a theft. Regardless of the definition of the term "burglary" enunciated in *Taylor v. United States, supra,* we find that the respondent's conviction for burglary of vehicle with intent to commit theft in violation of Tex. Penal Code Ann. § 30.04 is an aggravated felony "theft offense" within the definition of section 101(a)(43)(G) of the Act. We note that the term "theft offense" is broader

than the term "theft"; that is, it incorporates violations other than those which are formally labeled theft. This is made clear by the parenthetical in section 101(a)(43)(G). The respondent received a 4-year suspended sentence to confinement for this offense. Accordingly, we find that the record establishes that he is removable as charged.

The respondent argues that the retroactive application of the changes to immigration law violates his constitutional right to due process of law. We are without authority to declare our governing statute unconstitutional, so we cannot consider the argument that the revised Act violates the respondent's due process rights. *Matter of L-S-J-*, Interim Decision 3322, at 2 (BIA 1997); *Matter of Hernandez-Puente,* 20 I&N Ded. 335, 339 (BIA 1991); *Matter of U-M-,* 20 I&N Dec. 327, 334 (BIA 1991), *aff'd,* 989 F.2d 1085 (9th Cir. 1993); *Matter of Patel,* 19 I&N Dec. 774, 784 (BIA 1988).

The respondent is a native and citizen of Mexico, he expressed no fear of returning to that country, and the Immigration Judge designated Mexico as the country of removal. We find that the respondent has been convicted of an aggravated felony and that he has failed to show eligibility for any relief from removal. Accordingly, we dismiss the appeal.

ORDER: The appeal is dismissed.

Appendix C

THE IMMIGRATION COURT

United States Department of Justice
Executive Office for Immigration Review
1200 Main Street, Suite 700
Dallas, Texas 75202

In the Matter of: Ricardo Lopez-Elias

In Removal Proceedings: A13 657 249

Filed: April 19, 1999

Charge: INA Section 237(a)(2)(A)(iii) Alien convicted of aggravated felony.

For the Immigration Service: Dallas, Texas

For the Respondent: Ms. Terry Winston, Dallas, Texas

DECISION AND ORDER OF THE IMMIGRATION JUDGE

Mr. Ricardo Lopez-Elias was born in Mexico on September 2, 1949 and he was admitted to the United States on February 3, 1964 as an immigrant. On July 11, 1985 he was convicted in Dallas County, Texas for a May 26, 1985 burglary of a vehicle for which he was sentenced to four years imprisonment, which was suspended. On October 20, 1989 an order was entered by the sentencing judge setting aside the judgment of conviction and indictment. Then, in late 1998, the respondent was arrested for outstanding traffic tickets and briefly detained. The Immigration and Naturalization Service (INS) then took him

into custody and issued a Notice To Appear (NTA) on December 17, 1998 asserting that he is an aggravated felon and should be deported for the 1985 burglary of a vehicle. As originally filed the NTA specified that the respondent was viewed as an aggravated felon as defined in the INA 101(a)(43) without reference to any particular subparagraph thereof, but with a reference to a crime of violence. Respondent's counsel demanded that the reference to the aggravated felony definition be clarified and the INS responded by amending the NTA to explicitly mention INA Sec. 101(a)(43)(G). [Subsection G contains a specific reference to burglary whereas subsection F refers to crimes of violence.]

Counsel for respondent has argued that the burglary of a vehicle cannot be viewed as a crime of violence either (1) as a felony that has as an element the use, or threatened or attempted use of force, or (2) as a felony which by its nature involves a substantial risk that physical force against a person or property may be used in the commission of the offense. The courts of the United States in Texas do not share that view. Burglary of a vehicle has been held to be a crime of violence and an aggravated felony if a sentence of a year or more is imposed. *U.S. v. Ramos-Garcia,* 95 F.3d 369 at 371 (5th Cir. 1996), *cert. den.* 117 S. Ct. 351; *U.S. v. Rodriguez-Guzman,* 56 F.3d 18 at 20 (5th Cir. 1995); and *U.S. v. Galvan-Rodriguez,* No. 97-50901, ___ F.3d ___ (5th Cir. 3-4-99).

Counsel for respondent also argued that the respondent's conviction does not conform to the definition of burglary in 18 U.S.C. 924(e) and therefore it does not fit the corresponding definition in the INA. Sec. 101(a)(43)(G) encompasses both theft and burglary. The respondent's offense could be viewed as a theft matter as

easily as a burglary and either may be considered to involve violent conduct. If the proceedings are terminated concerning this case as one limited by INA 101(a)(43)(G) it could immediately be reinstituted as one controlled by INA 101(a)(43)(F) because of the 5th Circuit opinions concerning crimes of violence.

The evidence of record consists of admissions and documents. The documents are:
#1 The Notice to Appear
#2 The amendment to the NTA, a form I-261
#3 The indictment for the 5/26/85 burglary of a vehicle
#4 The judgment of conviction for the 5/26/85 burglary of a vehicle entered on 7/11/85
#5 The 10/20/89 order setting aside the 7/11/85 judgment of conviction
#6 The INS form I-213 dated 12/17/98

The respondent has admitted that: [1] he is an alien, [2] he was admitted as a permanent resident, and [3] he was the defendant in the criminal proceeding which led to the 7/11/85 judgment in evidence as Exhibit #4. Based on the documents and admissions, I find that the respondent is an aggravated felon on account of the 1985 conviction evidenced by Ex #4. The BIA and the United States 5th Circuit Court of Appeal have held that IIRIRA which became effective on September 30, 1996 changed the law pertaining to convictions entered before November 18, 1998. *In re Robt. Lettman,* I.D. 3370 (BIA 11-5-98). *Moosa v. INS,* ___F.3d___ (5th Cir. 4/2/99), 1999 WL 181836 (5th Cir.). Even though the state has relieved him of the Texas disabilities of conviction, (Ex #5) the immigration consequences persist. *In re Roldan-Santoyo,* I.D. #3377 (BIA 3/3/99); *Moosa v. INS, supra.*

Appendix C

Respondent has contended that the Constitution of the United States prohibits any retroactive application of sections of the INA which would make him subject to removal for conduct which might not have made him deportable when committed in 1985. I hold that I do not have jurisdiction to adjudicate such challenges to the validity of the Act or to the authority of the Congress of the United States. In *Moosa,* it was noted that: "it is well settled that Congress has the authority to make past criminal activity a new ground for deportation."

There do not appear to be any forms of relief available to respondent. There do not appear to be any applications for a visa for him pending before the INS. If a visa was available, he could not adjust because a 212(h) waiver is no longer allowed. *In re Ayala-Arevalo,* I.D. #3371 (BIA 1998). No waiver is available under the former INA Sec. 212(c). *In re Ponce de Leon-Ruiz,* I.D. #3261 (BIA 1997) and *In re Cazares-Alvarez,* I.D. #3262 (BIA 1997). Both INA Sec. 240A and 240B preclude grants of cancellation or voluntary departure to aggravated felons. There is no other discernible relief available.

THEREFORE, IT IS ORDERED THAT RESPONDENT, RICARDO LOPEZ-ELIAS BE REMOVED FROM THE UNITED STATES AND RETURNED TO MEXICO.

(2)
DEC 1 2000
CLERK

No. 00-164

In the Supreme Court of the United States

RICARDO LOPEZ-ELIAS, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals properly dismissed for lack of subject matter jurisdiction under 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) petitioner's petition for review of his final removal order on the ground that petitioner was removable by reason of having committed an aggravated felony.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Abdel-Razek v. *INS*, 114 F.3d 831 (9th Cir. 1997)	13
Alcantar, In re, 20 I. & N. Dec. 801 (B.I.A. 1994)	14
Aragon-Ayon v. *INS*, 206 F.3d 847 (9th Cir. 2000)	11
Briseno v. *INS*, 192 F.3d 1320 (9th Cir. 1999)	14
Choeum v. *INS*, 129 F.3d 29 (1st Cir. 1997)	16
INS v. *Aguirre-Aguirre*, 526 U.S. 415 (1999)	12
Mendez-Morales v. *INS*, 119 F.3d 738 (8th Cir. 1997)	15
Pataki, In re, 15 I. & N. Dec. 324 (B.I.A. 1975)	14
Perez, In re, Interim Dec. No. 3432 (B.I.A. June 6, 2000)	6
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943)	17
Solorzano-Patlan v. *INS*, 207 F.3d 869 (7th Cir. 2000)	8, 11
Sousa v. *INS*, 226 F.3d 28 (1st Cir. 2000)	11
Taylor v. *United States*, 495 U.S. 575 (1990)	7
Xiong v. *INS*, 173 F.3d 601 (7th Cir. 1999)	16
Ye v. *INS*, 214 F.3d 1128 (9th Cir. 2000)	8

Statutes and rule:

Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657	2

Statutes and rule—Continued: Page

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1277 14
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 309-546 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* 2
8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998) 4
8 U.S.C. 1101(a)(43) (Supp. IV 1998) 2, 4
8 U.S.C. 1101(a)(43)(A) (Supp. IV 1998) 15, 16
8 U.S.C. 1101(a)(43)(F) (1994 & Supp. IV 1998) 14
8 U.S.C. 1101(a)(43)(F) (Supp. IV 1998) 3, 4, 5, 8, 9, 10, 11, 18
8 U.S.C. 1101(a)(43)(G) (Supp. IV 1998) 3, 5, 6, 7, 9
8 U.S.C. 1103(a)(1) (1994 & Supp. IV 1998) 12
8 U.S.C. 1105a(a)(10) (1994) 14
8 U.S.C. 1105a(c) (1994) 6
8 U.S.C. 1182(a)(2)(A)(i)(I) (1994 & Supp. IV 1998) .. 15
8 U.S.C. 1227(a)(2)(A)(ii) (Supp. IV 1998) 14-15
8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998) 2, 4, 10
8 U.S.C. 1229a(a) (Supp. IV 1998) 13
8 U.S.C. 1251(a)(1)(A) (1994) 14
8 U.S.C. 1252 (Supp. IV 1998) 2, 6
8 U.S.C. 1252(a)(1) (Supp. IV 1998) 2, 6
8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998) ..... *passim*
Texas Penal Code Ann. (West 1987):
§ 30.04 3
§ 30.04(a) 3
United States Sentencing Guidelines § 2L1.2(b)(1)(A) 8

In the Supreme Court of the United States

No. 00-164

RICARDO LOPEZ-ELIAS, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 209 F.3d 788. The decisions of the immigration judge (Pet. App. 16-19) and the Board of Immigration Appeals (Pet. App. 10-15) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2000. The petition for a writ of certiorari was filed on July 28, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1996, Congress enacted several major changes to the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Those changes were designed, in large part, to reduce the opportunities for criminal aliens to obtain administrative relief from removal, and to facilitate their removal from the United States by restricting and streamlining the process of judicial review of their removal orders. Of particular relevance to this case are the new provisions for judicial review of removal orders enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996), as amended by Act of October 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657. See generally 8 U.S.C. 1252 (Supp. IV 1998).

Under the judicial review scheme prescribed by IIRIRA, judicial review of a final order of removal is by way of petition for review in the court of appeals. See 8 U.S.C. 1252(a)(1) (Supp. IV 1998). The IIRIRA amendments provide, however, that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a criminal offense covered in, *inter alia*, 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). See 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998). Section 1227(a)(2)(A)(iii) provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission" is deportable and, upon order of the Attorney General, "shall * * * be removed" from the United States. 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. IV 1998). The term "aggravated felony," in turn, is defined at 8 U.S.C. 1101(a)(43) (Supp. IV 1998) to include, *inter alia*,

(F) a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year; [and]

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year.

2. Petitioner is a native and citizen of Mexico who was admitted to the United States as a lawful permanent resident in 1964. Pet. App. 16. On June 4, 1985, petitioner was charged in Texas state court with burglary of a vehicle, in violation of Texas Penal Code Annotated § 30.04 (West 1987). The indictment charged that petitioner did "knowingly and intentionally break into and enter a vehicle, without the effective consent of * * * the owner thereof, * * * with the intent to commit theft." C.A.R. (Certified Administrative Record) 203; Pet. App. 5, 16.[1] On July 11, 1985, petitioner was convicted and sentenced to four years' imprisonment. The sentence was suspended, and petitioner was released on probation. C.A.R. 201. Subsequently, on October 20, 1989, the sentencing court determined that petitioner had successfully completed his probation, and it entered an order setting aside petitioner's judgment

---

[1] At the time petitioner committed his crime, a person was deemed to have committed burglary of a vehicle under Texas law "if, without the effective consent of the owner, he *breaks into or enters* a vehicle or any part of a vehicle with intent to commit *any felony or theft*." Tex. Penal Code Ann. § 30.04(a) (West 1987) (emphasis added). As noted in the text, however, the indictment charged that petitioner broke *and* entered into the vehicle, and that he did so with intent to commit theft. See also p. 8 n.4, *infra*.

of conviction and dismissing the indictment. *Id.* at 200; Pet. App. 16.

3. On December 17, 1998, the Immigration and Naturalization Service (INS) served petitioner with a Notice to Appear in removal proceedings. The Notice charged that petitioner was subject to removal as an aggravated felon under Section 1227(a)(2)(A)(iii), "in that, at any time after admission, you have been convicted of an aggravated felony as defined in [8 U.S.C. 1101(a)(43) (Supp. IV 1998)], to wit: a crime of violence * * * for which the term of imprisonment imposed was one year or more." C.A.R. 255. Petitioner moved for a more definite statement, and the INS responded by amending the Notice on March 25, 1999, to charge that petitioner was subject to removal as an aggravated felon under Section 1227(a)(2)(A)(iii), "in that, at any time after admission you have been convicted of an aggravated felony as defined in [8 U.S.C. 1101(a)(43) (Supp. IV 1998)], ***specifically subsection (G), a theft offense or burglary offense for which the term of imprisonment is at least 1 year***." C.A.R. 204 (emphasis in original). The amended Notice omitted the prior reference to a "crime of violence" and made no mention of Section 1101(a)(43)(F) in describing the charge for which petitioner was subject to removal.

On April 19, 1999, after a hearing, an immigration judge (IJ) found that petitioner was an aggravated felon under 8 U.S.C. 1101(a)(43) (1994 & Supp. IV 1998) and therefore ordered that he be removed from the United States. Pet. App. 17, 19. The IJ first noted that, although the INS's original charge specified that petitioner was an aggravated felon as defined in Section 1101(a)(43) without reference to any particular subsection thereof (but with reference to a "crime of violence"), the INS amended the charge in response to

petitioner's demand for clarification to refer only to subsection (G) of Section 1101(a)(43), which refers to burglary or theft. See *id.* at 17. The IJ nonetheless pointed out, with regard to subsection (F) (crime of violence), that under Fifth Circuit precedent, "[b]urglary of a vehicle has been held to be a crime of violence and an aggravated felony if a sentence of a year or more is imposed." *Ibid.* With regard to subsection (G) (theft or burglary), the IJ concluded that petitioner's crime could be characterized as either a theft offense or a burglary offense. *Id.* at 17-18. The IJ then noted that if proceedings were terminated under subsection (G), they could immediately be reinstituted as one controlled by subsection (F) because of the Fifth Circuit decisions concerning crimes of violence. *Id.* at 18.

4. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. Pet. App. 10-15. The BIA first addressed whether the IJ had erred in finding petitioner removable as an aggravated felon under the subsection (F) "crime of violence" theory because the INS had amended the Notice to Appear to charge petitioner with removability only under subparagraph (G). *Id.* at 13. The BIA concluded that, because the INS had amended its charge, the IJ's discussion relating to petitioner's removability under subparagraph (F) was "not properly before [the Board]." *Ibid.*

With regard to the subsection (G) charge, the BIA first noted, but did not address in detail, the question whether burglary of a vehicle is properly considered a "burglary offense" under federal immigration law. Pet. App. 14.[2] The BIA then focused its analysis on whether

---

[2] The BIA has since concluded that the Texas offense of burglary of a vehicle is not a "burglary offense" covered by the

petitioner's offense was a "theft offense." The BIA observed that the indictment in petitioner's case charged him specifically with breaking and entering the vehicle with intent to commit theft, and that petitioner had admitted that he stole a battery and a radio from the car. *Ibid.* The BIA also stated that "the term 'theft offense' is broader than the term 'theft'; that is, it incorporates violations other than those which are formally labeled theft." *Id.* at 14-15. The BIA therefore ruled that petitioner's burglary conviction constituted a conviction for a theft offense within the meaning of subsection (G) of Section 1101(a)(43). *Id.* at 14.

5. Petitioner filed a petition for review of his removal order in the court of appeals pursuant to 8 U.S.C. 1252(a)(1) (Supp. IV 1998).[3] The government moved to dismiss for lack of subject matter jurisdiction on the ground that Section 1252(a)(2)(C) deprived the court of jurisdiction to review the final order of removal because petitioner was "removable by reason of having committed" an aggravated felony. The government argued that the court lacked jurisdiction because petitioner's conviction for burglary of a vehicle constituted a "theft offense" and was therefore an aggravated felony under Section 1101(a)(43)(G). See Gov't Mot. to Dismiss 7-13. The government also argued (*id.* at 13-16) that petitioner's offense was properly classified as an aggra-

---

definition of "aggravated felony" in subsection (G) of Section 1101(a)(43). See *In re Perez*, Interim Dec. No. 3432 (June 6, 2000).

[3] On December 2, 1999, petitioner was removed to Mexico. That removal, however, does not moot this case. Although 8 U.S.C. 1105a(c) (1994) previously precluded judicial review of a deportation order once the alien departed from the United States, the new judicial review provision of the INA that was enacted in IIRIRA, 8 U.S.C. 1252 (Supp. IV 1998), does not preserve that restriction on judicial review.

vated felony as a "crime of violence" under settled Fifth Circuit precedent. Petitioner filed a short response to the government's motion in which he objected to the government's characterization of his offense as a theft offense, but he did not address the government's alternative argument that his offense was a crime of violence.

The court of appeals granted the government's motion and dismissed the petition for lack of jurisdiction. Pet. App. 1-9. The court first noted that, notwithstanding Section 1252(a)(2)(C)'s preclusion of review of petitions challenging removal orders against aliens who are removable by reason of having committed an aggravated felony, the court retains threshold jurisdiction to review jurisdictional facts that are material to the application of the preclusion of review in Section 1252(a)(2)(C), including whether the petitioner is indeed an alien who is removable by reason of having committed an aggravated felony. *Id.* at 3 & n.3.

The court then concluded that petitioner's conviction for burglary of a vehicle was neither a "theft offense" nor a "burglary offense" under subsection (G) of Section 1101(a)(43). With respect to the "theft offense" theory (on which the BIA had relied), the court stated only that petitioner's conviction "did *not* require a finding that he had actually committed theft; mere intent to commit was sufficient." Pet. App. 5. Nor, the court held, had petitioner committed a "burglary offense." Following this Court's decision in *Taylor* v. *United States*, 495 U.S. 575, 598 (1990), the court concluded that "[w]hen Congress deploys the term 'burglary' without specifying a definition, a generic understanding of the word based on the modern usage of the states, rather than the common law definition, should be used," Pet. App. 6, and that the generic understanding of

"burglary" includes only burglary of a structure, not burglary of a vehicle, *id.* at 7.

The court nonetheless concluded that petitioner's offense was an aggravated felony because, it stated, under settled Fifth Circuit case law, burglary of a vehicle is "a crime of violence" and therefore an "aggravated felony" under subsection (F) of Section 1101(a)(43). Pet. App. 7.[4] The court acknowledged that the INS "did not actually pursue removal proceedings on this ground," but held that it lacked jurisdiction over petitioner's challenge because petitioner had in fact been convicted of a crime of violence and therefore was

---

[4] The court of appeals relied on previous criminal cases construing the term "aggravated felony" under Sentencing Guidelines § 2L1.2(b)(1)(A), which refers to the definition of "aggravated felony" in Section 1101(a)(43), to include various crimes, including burglary of a vehicle. See Pet. 7 n.15. The Seventh and Ninth Circuits, however, have concluded that the offense of burglary of a vehicle is not a "crime of violence" (and therefore not an aggravated felony) rendering an alien removable if the offense is defined to include situations where the burglary does not involve a substantial risk of force or violence or is not accomplished through the use of force or violence—such as entering (but not breaking) the vehicle—and the charging papers and judgment of conviction do not show that force or violence was involved. See *Ye* v. *INS*, 214 F.3d 1128, 1134 (9th Cir. 2000); *Solorzano-Patlan* v. *INS*, 207 F.3d 869, 875-876 (7th Cir. 2000). In this case, although petitioner was charged with breaking *and* entering into a vehicle, see p. 3, *supra*, the judgment of conviction does not show whether the facts of the case involved breaking. As we have pointed out above (see p. 7, *supra*), however, petitioner did not raise any issue concerning the characterization of his offense as a "crime of violence" in the court of appeals, and he likewise does not present as a basis for review in this Court any question concerning a disagreement among the circuits as to whether burglary of a vehicle is a "crime of violence" under the INA. This case therefore does not warrant the Court's plenary review on that basis.

removable for having committed an aggravated felony. *Id.* at 7-8. The court noted that Section 1252(a)(2)(C) deprives it of jurisdiction to review any final order of removal against an alien "who *is removable* by reason of having committed" an aggravated felony. *Id.* at 8 (emphasis in original). "What the INS originally charged is of no consequence; so long as the alien in fact is removable for committing an aggravated felony, this court has no jurisdiction, irrespective of whether the INS originally sought removal for that reason." *Ibid.*

DISCUSSION

The court of appeals in this case rejected the theories of removability on which the INS actually proceeded against petitioner (namely, that he was convicted of an aggravated felony under subsection (G) of 8 U.S.C. 1101(a)(43) (Supp. IV 1998) because his crime was a burglary offense and a theft offense) and the sole basis on which the BIA actually found petitioner removable (that he was convicted of a theft offense). The court nonetheless ruled that it lacked jurisdiction over petitioner's petition for review because, it concluded, petitioner's conviction was a "crime of violence" under controlling Fifth Circuit precedent and was therefore properly classified as an aggravated felony under subsection (F) of Section 1101(a)(43). The court of appeals dismissed petitioner's challenge to his removal order based on that conclusion, even though the INS had withdrawn its charge that petitioner was subject to removal as an aggravated felon based on his having been convicted of a crime of violence and the final order of removal entered by the BIA did not rest on that ground.

Petitioner did not raise any objection to the government's motion to dismiss his petition for review in the

court of appeals on the ground that his offense constituted a crime of violence under subsection (F) of Section 1101(a)(43), and it accordingly would be appropriate for the Court to deny certiorari on that ground. Moreover, although petitioner contends (Pet. 9-10) that the court of appeals' invocation of the jurisdictional bar in Section 1252(a)(2)(C), based on his removability under subsection (F), violated due process, he does not contend that there were any disputed *factual* issues on the question whether his burglary of a vehicle constituted a crime of violence, such that he was entitled to an opportunity for a hearing on that question before the IJ, the BIA, or the court. The court of appeals, following circuit precedent that also had been cited by the IJ, simply concluded that his offense was a crime of violence as a *legal* matter. Petitioner had a full opportunity to contest that legal issue in the court of appeals, in response to the government's motion to dismiss his petition for review under the jurisdictional bar in Section 1252(a)(2)(C), but he failed to do so. Accordingly, we do not perceive any substantial due process objection to the decision below.

Nevertheless, for the reasons set forth below, in the particular circumstances of this case, we suggest that the Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case for further proceedings.

1. Section 1252(a)(2)(C) of Title 8 provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in" various provisions of the INA, including Section 1227(a)(2)(A)(iii), which provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." The court of appeals

reasoned that petitioner was "removable" by reason of having committed an aggravated felony because petitioner committed burglary of a vehicle, which, it further concluded, was a "crime of violence" as a matter of law under circuit precedent and was therefore an aggravated felony (which is defined to include certain crimes of violence, see 8 U.S.C. 1101(a)(43)(F) (Supp. IV 1998)). Although the court acknowledged that the INS did not proceed against petitioner on that ground, it concluded that "[w]hat the INS originally charged is of no consequence," since Section 1252(a)(2)(C) speaks to the jurisdiction of the courts, which is the responsibility of the courts, rather than the INS or the BIA, to ascertain. See Pet. App. 8.

We agree with the court of appeals that Section 1252(a)(2)(C) defines the jurisdiction of the courts, and that the courts are ultimately responsible for determining the reach of that jurisdiction. Thus, the government has argued (and the courts of appeals have generally agreed) that, if the BIA has concluded that an alien is removable based on a ground specified in the INA that would also preclude judicial review of the alien's removal order under Section 1252(a)(2)(C) (for example, a conviction for an aggravated felony), a court of appeals has the authority, on the alien's petition for review, to determine whether that statutory ground is properly applied to that case so as to trigger the jurisdictional bar in Section 1252(a)(2)(C). See Pet. App. 3 & n.3.[5] For example, if the BIA concludes (as it did in this case) that an alien is removable based on an aggravated-felony conviction because he was convicted

---

[5] See *Sousa* v. *INS*, 226 F.3d 28, 31-32 (1st Cir. 2000); *Solorzano-Patlan*, 207 F.3d at 871; *Aragon-Ayon* v. *INS*, 206 F.3d 847, 850-851 (9th Cir. 2000).

of a theft offense, the court of appeals has authority to determine whether the offense of conviction actually is a "theft offense" (and therefore an aggravated felony) within the meaning of the INA—with due regard for the BIA's principal responsibility in construing the terms of the INA. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424 (1999); 8 U.S.C. 1103(a)(1) (1994 & Supp. IV 1998) (providing that "[t]he Attorney General shall be charged with the administration and enforcement" of the INA and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling").

The court of appeals concluded in this case that, even though the BIA expressly did not decide whether petitioner is removable for having been convicted of a crime of violence (see Pet. App. 13), the court should ascertain for itself whether petitioner's offense was a crime of violence because Section 1252(a)(2)(C) provides that no court shall have jurisdiction to review a final order of removal in any case in which the alien is "removable" for having committed an "aggravated felony," which is defined to include certain crimes of violence. Whatever the scope of the jurisdictional bar in Section 1252(a)(2)(C) may be in other settings, however, on further reflection we do not believe it should have been invoked either by the INS or the court in the particular circumstances of this case. A court of appeals should not dismiss a petition for review based on a theory of removability that the INS specifically omitted from the charge in response to the alien's motion for a more definite statement and that the BIA specifically declined to address for that reason—at least where, as here, the criminal offense that did form the basis of the removability charge filed by the INS and sustained by the BIA was found by the court of appeals not to

independently support the order of removal on another ground that would deprive the court of jurisdiction under Section 1252(a)(2)(C). The INA vests principal responsibility for determining whether an alien is removable in the Attorney General, see 8 U.S.C. 1229a(a) (Supp. IV 1998), and institutional considerations counsel that a reviewing court in these circumstances should not adopt and proceed under a theory of removability that both the INS and BIA eschewed in administrative proceedings.

2. We do not suggest that the court of appeals never has authority to conclude, on petition for review, that an alien's offense was an "aggravated felony"—and that the court therefore should dismiss the petition for review—even if the BIA has not specifically determined that the alien is removable based on one of the classes of offenses covered by the INA's definition of "aggravated felony." For example, a court may properly conclude that an alien is "removable" based on an aggravated felony conviction, and may therefore dismiss the petition for review under Section 1252(a)(2)(C), where (1) the BIA has properly found an alien removable on a particular basis, (2) the INA provides that the conviction for which the alien was found removable would *also* render the alien removable as an aggravated felon, and (3) the BIA has not rejected a charge of removability on that aggravated-felony theory.

That was the situation in *Abdel-Razek* v. *INS*, 114 F.3d 831 (9th Cir. 1997), on which the court of appeals relied in this case, see Pet. App. 8 n.17. There the alien was arrested seven months after his entry in 1995 for stabbing a man to death. He pled guilty to voluntary manslaughter and was sentenced to 11 years in prison. In 1995, the BIA entered an order of deportation

against him. 114 F.3d at 832. Although the Ninth Circuit's decision does not state the specific theory on which the INS brought its charge and the BIA found Abdel-Razek deportable, it appears that he was deportable under 8 U.S.C. 1251(a)(1)(A) (1994), which applied to any alien who committed a crime involving moral turpitude within five years of entering the United States. See *In re Pataki*, 15 I. & N. Dec. 324, 326 (B.I.A. 1975) (voluntary manslaughter is crime involving moral turpitude). While Abdel-Razek's petition for review was pending, new legislation took effect that —like the current 8 U.S.C. 1252(a)(2)(C) (Supp. IV 1998), at issue in this case—precluded the courts of appeals from reviewing petitions for review at the behest of aliens convicted of aggravated felonies. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(c), 110 Stat. 1277 (amending 8 U.S.C. 1105a(a)(10) (1994)). Because the court of appeals determined that Abdel-Razek's manslaughter conviction was by definition an aggravated felony,[6] and because there was no basis for otherwise questioning the theory on which the removal order was entered against him, the court properly dismissed Abdel-Razek's petition for review.

In *Briseno* v. *INS*, 192 F.3d 1320 (9th Cir. 1999), the alien was charged with deportability and found deportable based on two convictions for crimes involving moral turpitude: one for petty theft, and one for forcible oral copulation and sodomy. See 8 U.S.C.

---

[6] The BIA has concluded that manslaughter is a crime of violence. See *In re Alcantar*, 20 I. & N. Dec. 801 (1994). It therefore is an aggravated felony under 8 U.S.C. 1101(a)(43)(F) (1994 & Supp. IV 1998) if the term of imprisonment exceeds a certain duration (which it did in *Abdel-Razak*).

1227(a)(2)(A)(ii) (Supp. IV 1998) (deportation for two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct). The INS did not charge Briseno with an aggravated felony based on his forcible sexual conduct offense, and the BIA did not specifically find him deportable on that basis, but the court nonetheless concluded that Briseno's forcible sexual conduct offense was an aggravated felony that deprived it of jurisdiction. The court of appeals thus simply added the legal characterization of "aggravated felony" to a conviction that otherwise supported a deportation order. In this case, by contrast, the court of appeals rejected the two other theories on which the INS had proceeded against petitioner, and so petitioner's removal order could not be sustained in the court of appeals except by reference to the "crime of violence" ground that the INS and the BIA had declined to adopt.

Similarly, in *Mendez-Morales* v. *INS*, 119 F.3d 738 (8th Cir. 1997), the BIA found the alien excludable based on his having been convicted of a crime involving moral turpitude, namely, first-degree sexual assault of a minor. See 8 U.S.C. 1182(a)(2)(A)(i)(I) (1994 & Supp. IV 1998) (alien excludable if convicted of a crime involving moral turpitude). While the alien's petition for review was pending, Congress expanded the definition of "aggravated felony" to include sexual abuse of a minor and made that expanded definition applicable to pending cases. See 8 U.S.C. 1101(a)(43)(A) (Supp. IV 1998). Because the crime forming the basis of Mendez-Morales' deportation order had thereby been defined also to be an aggravated felony, the court of appeals dismissed the petition for review. 119 F.3d at 739.

In our view, those decisions stand for the proposition that, where an alien has been properly found removable

by the BIA based on one ground of removability, and, in addition, the criminal offense that forms the basis of the alien's removal order is also properly classified as an aggravated felony as a legal matter, the court of appeals should dismiss the petition for review under the jurisdictional bar in Section 1252(a)(2)(C).[7] We agree

---

[7] Those cases are therefore unlike *Choeum* v. *INS*, 129 F.3d 29 (1st Cir. 1997), and *Xiong* v. *INS*, 173 F.3d 601 (7th Cir. 1999), on which petitioner relies (Pet. 6-8). In *Choeum*, the BIA ruled that the alien was deportable based on her conviction for kidnaping, which the BIA has held to be a crime involving moral turpitude (but which, under the applicable law governing at the time, was not an aggravated felony, see 129 F.3d at 37). The court of appeals rejected the INS's submission that the court's jurisdiction was precluded because Choeum had also been convicted of burglary, which offense, the INS contended, was on the facts of that case a "firearms offense" depriving the court of jurisdiction under a statutory preclusion of review. See *id.* at 37-38. The court stressed that the INS's charges against Choeum did not mention the burglary conviction in either the factual allegations or the grounds for deportability, *id.* at 35-36, and concluded that the INS may not "substitute new grounds for deportation at [the judicial review] stage in the proceedings, solely for the purposes of depriving the federal courts of jurisdiction," *id.* at 40. In *Xiong*, the alien was convicted of statutory rape, and the BIA held that he had been convicted of a crime of violence. The court of appeals rejected the BIA's conclusion that the crime was one of violence. 173 F.3d at 605-607. The court also rejected the government's submission that the offense was an aggravated felony on the alternative ground that it involved sexual abuse of a minor (see 8 U.S.C. 1101(a)(43)(A) (Supp. IV 1998)), stressing that Xiong had never had the opportunity to challenge the classification of his offense as sexual abuse of a minor. 173 F.3d at 608.

Choeum and *Xiong* are distinguishable from *Abdel-Razek*, *Briseno*, and *Mendez-Morales*, discussed in the text, because they do not involve a situation where the court simply determined that a legal classification ("aggravated felony") was properly attached to a conviction that otherwise formed an independent and correct

with those decisions. We have concluded, however, that this case is different and that the jurisdictional bar should not have been invoked in a manner that leaves the final order of removal against petitioner unreviewed and therefore fully in effect. To be sure, the INS charged petitioner with removability based on an "aggravated felony" conviction. But as we have explained, the legal classification that the INS and the BIA employed to characterize petitioner's offense as an aggravated felony was entirely different than the one relied on by the court (which had been specifically dropped by the INS), and the grounds that were relied upon by the INS and the BIA to conclude that petitioner was an aggravated felon and therefore removable from the United States were rejected by the court. The consequence of applying the jurisdictional bar in these circumstances is that the court of appeals essentially held that the final order of removal could not be sustained on the only grounds that were relied upon by the agency, but proceeded to dispose of the case in a manner that effectively sustained the order on a ground that was not only not relied upon but was withdrawn by the agency. That result is in considerable tension with established principles of judicial review of agency action, see *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), and we do not believe that Section 1252(a)(2)(C) should be construed to require it.

The application of the jurisdictional bar in the unusual circumstances of this case presents no question of broad importance warranting plenary review by this Court. And, as we have said (see pp. 10-11, *supra*),

---

basis for the BIA's deportation order. Because there thus is no conflict among the circuits, we do not believe that this issue warrants the Court's plenary review.

because petitioner did not raise the "crime of violence" issue in the court of appeals, this Court might appropriately deny review on that ground. But because the government specifically dropped the charges under subsection (F) in the administrative proceedings but then relied on subsection (F) in the court of appeals in successfully moving to dismiss the petition for review, we suggest that the Court grant the petition, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further proceedings in light of the position set forth in this brief.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded to the court of appeals for further proceedings in light of the position set forth in this brief. In the alternative, the petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

DECEMBER 2000